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CONSIDERATIONS ON THE STATE CORPORATIONS IN FEDERAL AND INTERSTATE RELATIONS.

THE NORTHERN SECURITIES CASES.

PART II.

THE WASHINGTON SUIT.

32. The State of Washington has filed a bill in the Supreme Court of the United States against the Northern Securities Company and the Great Northern, and Northern Pacific Railways, charging them with conspiracy and the making of an illegal agreement. The bill recites:

"That the purpose of said agreement and unlawful conspiracy and of the parties thereto, was the creation of a trust, or the formation of a combination by which a monopoly of railway traffic in the State of Washington and elsewhere, would be perfected; that the said Northern Securities Company was organized for and is to be used as a medium through and by which this unlawful agreement, conspiracy, purpose and object can, and, if not enjoined, will be accomplished; that this agreement and conspiracy, and the consummation thereof, is in restraint of trade, tends to create a monopoly in railway traffic in the State of Washington and elsewhere, is against public policy and void."

States of the Union as Suitors.

33. The complainant is a State of the Union. It appears before a court which is "foreign" in the sense of

being the tribunal of another government. Our States have attributes of sovereignty sufficiently marked to bring their suits into a relation with those instituted in foreign courts by independent sovereigns and, while the body of case law on this subject is not large, it is substantial enough to yield some principles of interest.

A court whose aid is invoked by a foreign sovereign will not decline to entertain the suit merely because of the status of the plaintiff[1], though questions have arisen in respect of the precise name in which suit should be brought.[2]

The proper subjects of suit by sovereigns are rights of a private, though not necessarily of a personal nature.[3]

To vindicate political rights a foreign sovereign should address the executive, not the judicial department. This distinction is well recognized in general jurisprudence, though it is not always drawn with precision.[4]

The distinction is of great importance in our Federal jurisprudence. True, the Supreme Court in adjudicating State boundary controversies takes cognizance of disputes which between nations would be termed "political," but this is exceptional, and I have pointed out that in creating "a more perfect union" our States necessarily surrendered whatever national rights of war and reprisal they possessed, without gaining commensurate Federal rights of litigation.[5]

34. When a government prosecutes a person in its own courts it appears as a sovereign seeking in its own tribunals the vindication of some right conferred by its own laws. But it is in a different position when it comes into the court of another sovereign. In the first place it must be recog-

[1] The Sapphire (1870) 11 Wall. 164; King of Prussia *v.* Küpper (1856), 22 Mo., 550.

[2] See Colombian Government *v.* Rothschild (1826) 1 Simons 94; Republic of Mexico *v.* De Arangoiz (1856) 5 Duer 634; Yzquierdo *v.* Clydebank Co. [1902] A. C., 319.

[3] The Anglo-Indian Code of Civil Procedure of 1882, S. 431, well expresses the principle. A foreign State may come into court provided "(*b*) the object of the suit is to enforce the private rights of the head, or the subjects of the foreign State."

[4] See Emperor of Austria *v.* Day and Kossuth (1861), 2 Giff., 628, 3 D. F. & J., 217.

[5] See Notes on Suits between States, COLUMBIA LAW REVIEW, May and June, 1902, S. 19.

nized as a sovereign by the foreign state. "What right have I as the King's judge" said Lord Eldon "to interfere upon the subject of a contract with a country he does not recognize?"[1] Then when a sovereign sues in a foreign court, whether as the representative of its community or as a monarch representing a personal claim, it doffs its attributes of sovereignty to an appreciable extent. It appears as a suitor before a tribunal whose authority it acknowledges by seeking its aid. From this acknowledgment two important consequences flow:

First. The sovereign submits to the rules and the procedure of the foreign court as nearly as may be like a private suitor, which it has become, in a sense, by its voluntary act.[2] In fine, the principle that he who seeks justice must be prepared to do justice renders a sovereign plaintiff subject to any order which the court is competent to enforce, either directly, or by conditioning further proceedings upon obedience.

Second. The sovereign does not, as when appearing before domestic tribunals, require its own judges to construe and enforce its own laws. It requests foreign judges to administer whatever law they find applicable to the case. This law will never be its own in virtue of any intrinsic authority, though principles of international law may commend its recognition.[3]

35. Should a State of the Union bring an action in an alien, say an English, court, and present a cause of action good in itself, I think the court would entertain the suit, recognizing the State as a political corporation, though not as a sovereign in the international sense.

Should a State of the Union desire to bring suit in the court of a sister State there seems to be no constitutional objection to its doing so. But to assure an impartial

[1] Jones *v.* Garcia del Rio, (1823) Turner & Russ. 297. See also Berne *v.* Bank of England (1804) 9 Ves., 347.

[2] See King of Spain *v.* Hullet, (1833) 1 Cl. & F. 332; Prioleau *v.* U. S, (1866) L. R. 2 Eq. 659; Duke of Brunswick *v.* King of Hanover, (1844). 6 Beav. 1; Costa Rica *v.* Erlanger, (1875) L. R. 1 Ch. D. 171; Rothschild *v.* Queen of Portugal (1839) 3 Y. & C. 540; The Newbattle (1885) 10 P. D. 33; Rowan *v.* Sharps Rifle Co. (1860) 29 Conn. 282.

[3] See SS. 47–49.

tribunal for the hearing of causes between States, a State and a citizen of another, and between citizens of diverse States, the Constitution opens the Federal courts, and when a State is the complainant it provides the method of original suit in the Supreme Court. Availing itself of this provision Washington has obtained leave from the Supreme Court to file a bill in equity against the defendants.[1]

The Defendants.

36. The defendants are corporations organized in, or adopted by States. They are not citizens of their incorporating States within the meaning of the clause of the Constitution declaring that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States,"[2] but they are treated as such in respect of the jurisdiction of the Federal courts because, for this purpose, it is presumed that all the stockholders of a corporation are citizens of the incorporating State.[3] This presumption is established without regard either to the actual citizenship of the stockholders[4] or to the admission of the corporation to do business in another State.[5]

For the purpose of jurisdiction the Northern Securities Company is a citizen of New Jersey, the Northern Pacific Railway a citizen of Wisconsin, and the Great Northern Railway a citizen of Minnesota.[6]

37. We have seen that the Securities Company was organized under the laws of New Jersey, and that, pursuant to its charter; it has acquired control of the Great Northern and Northern Pacific Railways. Because of this action Washington calls it a railway company. Evidently the Company is deeply interested in railroads, but it would not

[1] Washington *v.* Northern Securities Co. (1902) 185 U. S. 254

[2] Paul *v.* Virginia (1868) 8 Wall. 168.

[3] Ohio & Miss. R. *v.* Wheeler (1861) 1 Black 286.

[4] St. Louis & S. F. R. *v.* James (1895) 161 U. S. 545.

[5] Louisville R. *v.* Louisville Trust Co. (1898) 174 U. S. 552.

[6] These railways were largely built under Federal and Territorial laws, and the processes by which they have become State corporations need not be recited here. The original State names of the Northern Pacific, and the Great Northern. were the Lake Superior and St. Cloud, and the Minneapolis and St. Croix.

profit Washington to call it a railway company, or even emphasize the fact that it is a corporation, unless it were attempting to do business in the State, for, except in this case, a corporation of New Jersey and an individual citizen thereof stand, generally, in the same position with regard to the government of Washington.

The Company does no business, nor need it seek to do any, in Washington. It simply holds stock in railroad companies of Wisconsin and Minnesota which operate railroads running through Washington, and it is not required to do anything in the latter State or ask any powers from it in order to manage and protect its investments.

38. Unlike the Securities Company, the Great Northern and Northern Pacific Railways have relations with Washington, and it will be useful to determine what they are, and whether they have been changed by the transfer of stock to the company.

A corporation chartered by one of our States is a "foreign" corporation to all the others; and we have seen that it is not a "citizen" to whom other States must accord the "privileges and immunities" enjoyed by their own citizens. It follows that a corporation can do business in another State only by that State's license: A license sometimes expressed in a statute, sometimes inferred from the assumed prevalence of an interstate "comity."[1] In virtue of this comity a foreign corporation constituted on lines different from those prescribed by a State for domestic corporations may be nevertheless in a position to claim hospitality in the absence of legislation plainly denying it. This practice sometimes results in the admission of a foreign company more liberally chartered than domestic corporations of like purpose, but this seems to be justified on the theory that a State is supposed to judge a corporation seeking admission not so much by its structure as by its objects. If these objects are not repugnant to the local law it is not to be presumed that the State is hostile. On this theory a foreign corporation created by special charter is not deemed to be excluded by a State merely because this State permits the

[1] Bank of Augusta *v.* Earle (1839), 13 Peters 519; Christian Union *v.* Yount (1879) 101 U. S. 352.

organization of corporations under general laws only.[1] For an illustration of the denial of hospitality we turn to a decision that the repeal of a statute authorizing corporations for a certain purpose operates as a bar to the admission of a foreign corporation intending to promote a similar purpose.[2]

39. A State cannot exclude a corporation in the employ of the Federal Government, or engaged in a work of Federal concern,[3] though Congress cannot compel the State to aid the corporation by a grant of franchises, a right to condemn land, for example.[4]

Railroads are the principal instruments of interstate commerce, and, if some day a State shall attempt to thwart the construction of an interstate line, it may appear that, while the State cannot be compelled to further the enterprise, there is a Federal power to promote it.[5] Be this as it may, where a railway forms a link in the chain of interstate communication it seems that the United States might prevent a State from wilfully breaking the connection.

These observations concerning the status of interstate railroads generally have some interest here in view of the particular relations of the Great Northern, and Northern Pacific Railways to the State of Washington.

These railways were located by direct authority of Congress in that part of the Federal territory now included in the State of Washington; and because of this authorization they have been called "national highways." The Supreme Court said in Roberts *v.* Northern Pacific Railway Company[6]:

Professor Westlake says in regard to English practice: "The right of foreign and colonial corporations to carry on business in England, without any authority to that effect from Parliament or Government, has now passed unquestioned for so long that it may be considered to be established." Private International Law, 3d Ed. p. 337.

[1] Cowell *v.* Springs Co. (1879), 100 U. S. 55.

[2] Empire Mills *v.* Grocery Co. (Texas, 1891), 15 S. W. Rep., 505.

[3] Pembina Co. *v.* Pennsylvania (1887), 125 U. S. 181; Horn Silver Co. *v.* N. Y. (1892) 143 U. S. 314; Postal Tel. Co. *v.* Adams (1894) 155 U. S. 688.

[4] See Pensacola Tel. Co. *v.* Western Union Tel. Co. (1877), 96 U. S. 13.

[5] See S. 25. [6] (1894) 158 U. S. 21.

"It is obvious that the effect of this legislation of Congress was to grant the power to construct and maintain a public highway for the use of the people of the United States, and subject, in important respects, to the control of Congress. That portion of its road that lies within the State of Wisconsin is of the same public character as the portions lying in other States or Territories. Whatever respect may be due to decisions of the courts of Wisconsin defining the character and powers of Wisconsin corporations owning railroads, the scope of those decisions cannot be deemed to include the case of a national highway like that of the Northern Pacific Railroad Company. All of the great transcontinental railroads were constructed, under Federal authority, through Territories which have since become States. Such States are possessed of the same powers of sovereignty as belong to the older States. Hence, if the contention were true that the State of Wisconsin, through its judiciary, can deprive that portion of the railroad within its borders of its national character, and declare the Northern Pacific Railroad Company to be a private corporation and not engaged in promoting a public purpose, the same would be true of the other States through which the road passes. Such a contention, we think, cannot be successfully maintained."

While a State cannot deal at pleasure with a corporation of another State operating a railway within its limits, *a fortiori* with a "national highway" authorized by Congress, and constructed prior to the incorporation of the State itself, it is nevertheless true that all foreign railway corporations doing business within a State are subject to the local law wherever its application will not prejudice legitimate Federal interests. And in this regard it is quite sufficient for our purpose to understand that the control of a State over the sections of interstate railways within its territory extends to the requiring of proper facilities,[1] which will not hamper interstate commerce[2], and reasonable local rates;[3] though it has been intimated that Congress in chartering a railroad may reserve "power to remove the corporation in all its operations from the control of the State."[4]

The acquisition of stock by the Company has in nowise affected these local powers of regulation. Every duty originally owing to Washington from these foreign corporations

[1] See Gladson *v.* Minnesota (1897) 166 U. S. 427; Lake Shore & M. S. R. *v.* Ohio (1899) 173 U. S. 285.

[2] See Ill. Cen. R. *v.* Illinois (1896) 163 U. S. 142.

[3] See Reagan *v.* Farmers' Loan and Trust Co, (1894) 154 U. S. 362.

[4] See Reagan *v.* Mercantile Trust Co. (1894) 154 U. S. 416.

is owing to-day; every means for enforcing these duties is as efficacious now as it was prior to the acquisition. The relation between the State and the railways is unchanged.

The Transaction in Controversy.

40. The transaction which Washington seeks to disrupt is the holding by a New Jersey company of stocks of a Wisconsin railway corporation and a Minnesota railway corporation, each operating lines in Washington.

The *locus* of the transaction is in New Jersey, for there is the home of the Securities Company, and the place where the stock is held.[1] While the matter of locality is of no concern in the Federal suit,[2] it will appear that this is of interest here, because it bears upon the relation between Washington and the Company, and upon the choice of the governing law.

The bill of complaint, like the petition in the United States suit, criticizes the motives and methods of the transaction; but these are quite as irrelevant in this as we found them to be in that case;[3] and for the same reason, that the question before the Court is whether acts accomplished cause a legal injury, and the solution is not promoted by inquiring how and why they were performed.

Substantially, Washington's grievance is that the Securities Company, by holding a majority of the stocks of the Great Northern and Northern Pacific Railways, is enabled to administer these lines from the standpoint of a single controlling interest, with the result that the State of Washington as the owner of public lands and institutions, and the people of Washington generally, will be at once deprived of the benefits hitherto accruing from the competition of rival lines, and oppressed by the exactions of corporations working in harmony.

41. Before going on to consider whether this alleged grievance amounts to a cause of action let us inquire whether the fact that the complainant is a State tends to strengthen its assertion that there is a cause, and then whether the fact that the Securities Company is a corpora-

[1] See S. 61. [2] See S. 13. [3] See S. 17.

tion tends to weaken the defendants' assertion that there is none.

Unquestionably a State of the Union may, in virtue of its sovereignty, maintain causes of action quite impossible to an individual. For example, it may file a bill against another State to establish its claim to exercise jurisdiction over disputed territory. But, generally speaking, the closer the grievance of a sovereign conforms in essence to the grievance of an individual, the better its standing in court. Indeed, even a suit for the establishment of territorial jurisdiction is not unlike an action in ejectment.[1] In no suit, however, can a sovereign prevail unless it prove the existence of a legal duty owing to it from the defendant, and a breach of this duty. Damage to a sovereign amounting to an injury in law must be quite as positive and direct as though the complainant were a private person.[2]

The fact that the Company is a corporation does not tend to weaken its assertion that the bill does not disclose a good cause of action. In this, as in the Federal suit, the natural and the artificial person being, in theory of law, alike capable of committing the action complained of, are not to be differentiated in determining the question of liability.[3]

42. The bill alleges that "each and all of the acts complained of" (a collection which we have reduced to a single head, namely, the holding of stocks by the Company and the consequences thereof) "violates and evades the laws of the land, and the settled public policy and laws of the State of Washington."

"The term "laws of the land" evidently refers to a body of law separate from the distinctively local law of Washington, and sufficiently comprehensive to attribute rights and duties to both the State of Washington and the corporations of sister States—a law of at least Federal scope. There is here no governing common law,[4] and it will be shown that the Federal written law embodied in the Constitution and acts of Congress does not furnish the

[1] See Sir F. Pollock. The Sources of International Law. COLUMBIA LAW REVIEW, Dec., 1902, p. 515.

[2] See U. S. *v.* Jacincto Tin Co. (1888) 125 U. S. 285; U S. *v.* Bell Tel. Co. (1888) 128 U. S. 366.

[3] See S. 26. [4] See S. 3.

rule of action governing the case at bar. The "law of the land" pertinent to this case is that part of international law which applies to our interstate intercourse.

"The settled public policy and laws of the State of Washington" refers to a body of local law, and this is set out in the bill as follows:

"That it has ever been a part of the settled and public policy of the State of Washington to prohibit therein the consolidation in any manner, of competing and parallel lines of railway, and to this end the people thereof, on the first day of October, A. D. 1889, in organizing and adopting a State government, adopted as part of the Constitution of said State, the following provisions which have ever since been and now are a part of the organic law of said State, to wit:

"Art. XII, Sec. 14. No railroad company or other common carrier shall combine or make any contract with the owners of any vessel that leaves port or makes port in this State, or with any common carrier by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying."

"Art. XII, Sec. 16. No railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning a competing line."

"Art. XII, Sec. 22. Monopolies and trusts shall never be allowed in this State, and no incorporated company, copartnership or association of persons in this State shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity * * *."

43. The 14th Section of Art. XII does not appear to have been supplemented by legislation, and has never been construed by the Washington courts, so its legal effect is not clearly established. The 16th Section is in like case. Yet the bill of complaint charges that the defendants have effected a consolidation of railways in Washington contrary to law; and it goes on to allege that transactions of this kind are opposed to the policy of New Jersey. By this is meant, I suppose, that had the Company acquired majority interests in the stocks of competing railroads in New Jersey, its action would be unlawful, and the inference is that New Jersey does not pretend to authorize abroad what would be illegal at home. The inference betrays a radical misconception of the part played by New Jersey.

Had New Jersey presumed to authorize the Company to "consolidate" these lines in the legal significance of the term, the charter would have been blank paper, not, be it noted, because of any prohibition in the Constitution of Washington, but for the imperious reason that the lines lie beyond the territory of New Jersey, and are therefore beyond the reach of its laws. But New Jersey has not authorized the Company to "consolidate" railroads anywhere, nor to do any act in another State except in submission to that State's laws. It has simply permitted the Company to acquire marketable property of a personal character—corporate stocks, bonds, etc., of every description, to any amount its resources permit.

44. Section 22 of the Constitution of Washington, as recited in the bill, is shorn of its final sentence which reads:

"The Legislature shall pass laws for the enforcement of this section by adequate penalties, and in the case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchises."

The legislature has omitted to enact such laws. Whether or not the section is relegated, because of this omission, to the class of constitutional provisions treated by courts as in some respects ineffective in the absence of complementary legislation,[1] it does not authorize the State to inflict penalties upon a corporation disregarding its terms.

At most the section would render the transactions in question liable to be enjoined or dissolved and in their only State decision in which it has been construed the court does not treat it as an absolute bar to the consolidation of competing lines, and, inferentially, seems to deny to the other sections cited the force and effect asserted in the bill of complaint. In this case[2] a city ordinance dealing with street railways was the subject of controversy, and the court said in the course of its opinion:

"It is next said that the proposed ordinance, when considered in connection with the acquisition of the existing street-railway lines, creates a "monopoly and trust," and is therefore in violation of Sec. 22 of article 12 of the state constitution. * * *.

[1] See Grove *v.* Slaughter (1841) 15 Peters 449; State *v.* Spokane (1901) 24 Wash. 53.

[2] Wood *v.* Seattle (1900) 23 Wash. 1, 20.

"The argument is that portions of the lines now in operation, and which may be absorbed by the proposed ordinance, are parallel and competing lines, and because of this provision the city is without power to pass an ordinance under which they may be combined or consolidated. Whether the proposed ordinance will have the effect of consolidating competing lines does not very clearly appear from the record, but, assuming that it will, we cannot think that this section of the Constitution was intended to be a limitation upon the legislative power to authorize such a consolidation whenever it may deem the public interests demand it. The prohibition is directed against combinations between corporations, companies, or individuals, made 'for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity,' and it is combinations of this character and for these purposes that constitute the monopolies and trusts which the Constitution interdicts. Elsewhere in the Constitution ample power is given the legislature to correct and prevent abuses such as the respondents contemplate, by fixing maximum rates and charges for the transportation of passengers and freight; and it was from this power that the Constitution makers intended that relief should be found from (to quote from that instrument) 'discrimination and extortion in the rates of freight and passenger tariffs,' rather than from the fancied relief to be obtained from competing lines."

45. While the statutes of Washington may not warrant the organization of a corporation like the Securities Company, it does not appear that the authorization of such a company is forbidden by "the settled policy and laws of the State" as formulated in the Constitution. In short, it appears that the executive department of Washington presumes to request a Federal tribunal to enforce in New Jersey respect for a policy not even definitely formulated in laws and judicial decisions at home, but one of its own devising.

Supposing for the moment that the Supreme Court ought to take jurisdiction of a conflict between policies of equal States, this request may be found improperly pleaded, because it is preferred without joining parties whose presence is necessary if the Court is to deal equitably with a proper question of State policy much broader than the bill discloses.

I refer to North Dakota, Montana and Idaho. Through these States the Northern Pacific and Great Northern railroads also run, and they bear substantially the same relation to each of them as to Washington. Yet Washington has not seen fit to make these States parties to a suit in which

it prays for a decree that will affect it and them in equal measure.

The defendants declare that the Company's control of the railroads will enure to the benefit of all the States through which they run: Does not this suggest an economic question which each State is entitled to consider for itself? Washington declares that its policy is violated. What of the policies of the other States? An examination of the railway laws of these States will disclose more or less resemblance to the laws of Washington, but not complete agreement with them. In fact, there is a Montana statute expressly permitting the harmonizing of two competing railroads by lease.[1]

Even were the laws of all these States substantially alike, the Supreme Court would not be entitled to assume that the attitude of Washington toward the defendants is adopted by its neighbors. Likeness of texts does not imply uniformity in interpretation, and even a uniform interpretation, gleaned from local decisions in other cases, would not permit the Court to say that the policies of North Dakota, Montana and Idaho are by way of being enforced in the suit at bar. The enforcement of a policy is a question of expediency which each State must decide for itself,[2] and, while the silence of these States in respect of the Securities Company may not be attributed to approbation, it certainly does not suggest opposition.

These observations are not intended to point out a cura ble defect in pleading, for in my judgment the Supreme Court has no jurisdiction over mere conflicts of policy between States.[3] They are intended to emphasize the illegal selfishness which a State of the Union displays when it prays the Supreme Court to exalt its own policy as a rule of law in other States.

46. Even assuming the transaction complained of to be of a kind forbidden in Washington, does it follow that the State can require the Supreme Court of the United States to enforce its local laws beyond its borders? Cer-

[1] See State *v.* Montana R., (1898) 21 Mont. 221.

[2] See Bank of Augusta *v.* Earle (1839) 13 Peters, 594.

[3] See SS. 33, 65, 66.

tainly not if the law in question is of a penal nature, for it is a settled principle of international law that no state can call upon a foreign court to enforce its penal statutes.[1]

"Penal laws," says the Supreme Court, "strictly and properly are those imposing punishment for an offence committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon."[2] The laws of Washington in question do not fall within this strict definition of penal laws.

A somewhat broader definition may perhaps be deduced from the judgment in Wisconsin *v.* Pelican Ins. Co., where a statute imposing a pecuniary penalty upon corporations for violations of law was declared penal, although it does not appear that the executive had power to pardon, that is to say, to remit a penalty imposed. Even this definition is not pertinent in the case at bar, for Washington does not sue for any penalty.

In Huntington *v.* Attrill[3] the Court said:

> "The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."

Read by itself this statement might suggest a still broader definition of a penal law; namely, any law enforcible by a public, as distinguished from a private suit, and such a definition would apply to the suit at bar; but read in connection with the whole opinion, it does not appear that the court intended to define all laws as penal which are enacted for the protection of public interests, but only such of these as impose punishments for their violation; much less to define all public suits brought in foreign courts as penal, but only such as seek to secure the imposition abroad of punishments prescribed at home.

47. In my opinion, however, the suit of Washington does not turn on the question whether the local law it seeks

[1] Wisconsin *v.* Pelican Insurance Co. (1888) 127 U. S. 265.

[2] Huntington *v.* Attrill (1892) 146 U. S. 657.

[3] (1892) 146 U. S. 673.

to enforce abroad is of a penal nature. I think the real question is much broader. Has the Supreme Court the right to disrupt a transaction consummated in New Jersey because it is not sanctioned by a law made in Washington, whether this law be of a penal or a civil nature?

Judge Story's well-known statement: "The laws of no nation can justly extend beyond its own territories except as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction,"[1] declares a limitation of general acceptance, because it is based upon the principle that the power of a sovereign as expressed in its statutes constrains those persons only who are subject to its jurisdiction. If this were all, the impotency of the statutes, as such, in a foreign territory would be readily appreciated. But the exigencies of intercourse between civilized nations often lead the courts of one country to accord a certain respect to the laws of another. This respect is the foundation of private international law, and it is not necessary to consider here whether it should be uniformly rendered or withheld according to general principles, or whether its manifestation should depend upon the degree of reciprocal respect displayed by the country whose law is in question.[2]

Jurists in inculcating this respect sometimes give the impression that a tribunal deciding a cause in the light of a foreign statute is really aiding a foreign state to enforce its laws abroad, which is the very thing that Washington is trying to accomplish in the present suit. This is not the proper office of the court, which is instituted for the enforcement of the laws of its own sovereign exclusively. Nor, in theory of law, is this the true meaning of the court's action, as I shall endeavor to show.

48. When a foreign statute is called to the attention of a court, the court does not accept it in its original significance as a command, but tests it by some domestic standard of law.[3] Recognition will not be accorded if it would effect

[1] The Apollon (1824) 9 Wheaton, 370.

[2] See Hilton *v.* Guyot (1895) 159 U. S. 113.

[3] See Caldwell *v.* Van Vlissingen (1851) 9 Hare 425, Thompson *v.* Waters (1872) 25 Mich. 221.

within the jurisdiction a result repugnant to domestic law.[1]

If the statute is substantially duplicated in the local law there is no 'conflict of laws' at all. The court administers the local law.

If the statute differ from the local law, but can be recognized without effecting a breach of this law, the propriety of recognition will still be immediately determined by some domestic rule. Take, for example, the common case of a judicial interpretation of a contract according to the terms of a foreign law. The law is recognized indeed, but not on the theory that a foreign legislature has given it authority. It is recognized in conformity to the principle of domestic law that parties competent to make a contract are, speaking generally, free to choose the law that shall govern its interpretation, and the court simply finds that a particular law has been expressly or impliedly chosen.[2] In other words, the foreign law is not given the force of a legislative act, but is treated as an element in a particular contract. Again, for example, where a court sustains a right of action accruing under a foreign statute,[3] there is no direct enforcement of a foreign law as such. There is an application of the domestic rule that a person becoming entitled to a right of action may enforce it in any court having jurisdiction of the defendant.

49. Had the Securities Company been organized under an English statute, Washington could not induce an English court to condemn the holding of stocks on the ground that the consequences were repugnant to Washington law. The Court would respect the law of England under which the Company was formed.

I have said that there is no constitutional objection to a State's bringing suit in the court of a sister State,[4] and, were the present suit founded on good cause, it seems that a New Jersey court could give the desired relief. But

[1] Rousillon *v.* Rousillon (1880) 14 Ch. D. 351; Edgerly *v.* Bush (1880) 81 N. Y. 199.

[2] See Canada Southern R. *v.* Gebhard (1883) 109 U. S. 527.

[3] Northern Pacific R. *v.* Babcock, (1893) 154 U. S. 190. [4] See S. 35.

the New Jersey court, like the English, would in this case decline to be bound by Washington laws.

While there is a bond between the States of the Union that makes the United States a nation among the nations; while there is a homogeneity among the people who owe allegiance to the United States that makes them a national community, there is this likeness between the States and the nations—each State, like each nation, is free from subjection to the laws of any other.

"The several States are of equal dignity and authority," says the Supreme Court, "and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its own territory, except so far as is allowed by comity * * *."[1]

This independence is not qualified by the clause in the Federal Constitution, declaring that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."[2] This clause does not give the laws of a State ex-territorial authority. It does not require a State to govern persons within its jurisdiction by the laws of another State. It simply imposes upon these fraternal States as an express obligation that recognition of each other's laws and judgments as foundations of rights which, among civilized nations, is supposed to be freely adopted as a proper aid to intercourse.

50. Is Washington's position improved in point of law by bringing suit in the Supreme Court of the United States instead of in a New Jersey court. If so, the Federal court must be empowered to apply some principle of law governing interstate relations which the State court, if competent, is, at all events, not bound to administer.

We have remarked that the complainant in appealing to the "law of the land," as well as to its own written law, invokes some rule supposed to affect all parties to the suit, and we first turn to the Federal Constitution, which says: "This Constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the

[1] Pennoyer *v.* Neff, (1877) 95 U. S. 722. [2] Art. 4, S. 1.

United States, shall be the supreme law of the land." This "law of the land" does not govern the case at bar, for nothing in the Constitution itself, or in any act of Congress, even hints the propriety of the alleged cause of action. It follows that the suit at bar is a distinctively Federal cause only because the status of the parties permits its institution in the Supreme Court. It is not distinctively Federal in the sense that a peculiar principle of Federal law governs its adjudication.

International law is the proper "law of the land" in cases like this one, and it could be applied as well by a State as a Federal court.

The Supreme Court has, indeed, asserted its right to administer private as well as public international law, uncontrolled by State decisions.[1] But all this means is that the Court will determine any cause brought before it upon principles which ought to govern the action of a State court hearing a like cause.

In fine, while the Federal jurisdiction of suits between States is practically exclusive, inasmuch as in no other forum can one State be sued by another against its will, the jurisdiction of suits by a State or its citizens against citizens of another State is alternative. It simply assures an impartial adjudication of causes which State courts are legally competent to determine. As Justice Bradley said in Burgess *v.* Seligman:[2]

> "The very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views."

And in exercising this alternative jurisdiction the Federal court is supposed to reach the conclusion a State court ought to reach, through the application of principles which the State court ought to expound.

51. We are now in a position to consider the proper judgment of the Supreme Court in the case at bar.

So far as the alleged cause of action is made to depend upon a disregard of the peculiar laws of Washington it is

[1] Huntingdon *v.* Attrill, (1892) 146 U. S. 683.

[2] (1882) 107 U. S. 34.

plainly without merit, for these laws impose no obligation in New Jersey. The allegation that the Securities Company "violates and evades" these laws does not convey a legal meaning, for the reason that so long as the Company does no business in Washington its attitude towards the State's corporation laws cannot properly be termed hostile or evasive, but is essentially indifferent.

A corporation or a citizen of one State, however, may owe duties to another not strictly imposed by the peculiar laws or policies of the latter, but implied from the general principles of international law, and we must inquire whether these have been violated by the Company.

Courts have declined to recognize agreements in furtherance of schemes for breaking the laws of another State,[1] but a court might refuse to recognize a contract as creating a private obligation, and yet consistently decline to entertain a suit by a foreign government to enjoin performance, deeming such an action barred by the rule against the judicial enforcement of the political rights of a foreign sovereign. The Supreme Court of Massachusetts refused to recognize a contract for the purchase of liquor destined to be sold in Maine in violation of a prohibitory law[2]; but we may assume that it would not have entertained a suit by the State of Maine to enjoin the transaction. I make these observations simply to show that even if the transaction in the case at bar could have been dissolved in a private suit, for the reason among others that it contemplated the infraction of a State's policy, the fact might not strengthen a suit brought by that State, which is bound to prove an invasion of its private, as distinguished from its political rights.[3]

The comparatively few cases in which a State has appeared before the Supreme Court as complainant in an original suit, though somewhat variant in their objects, include none like the case at bar; yet a scrutiny of them shows that in reciting the public ownership of institutions and lands, and the collective interests of large bodies of individuals Washington presents interests susceptible of being injured by acts originating in another State, and, if

[1] Kennett *v.* Chambers (1852), 14 How. 38.

[2] Graves *v.* Johnson (1892), 156 Mass. 210. [3] See S. 33.

injured, entitled to the protection of the Court.[1] But the scrutiny also warrants the proposition, which indeed needs no precedents to approve its merit, that a State seeking to convict a citizen of another State of a breach of duty must prove a direct and appreciable injury to the person or thing alleged to be affected.

The complainants' case, already weakened by withdrawing all support based on peculiar State law and policy, is discredited by applying the broad principle of law, that a damage amounting to a legal injury must be direct, not remote; real, not conjectural. The grievance of Washington is an apprehension that a company in New Jersey will elect directors of corporations in Wisconsin and Minnesota, who will appoint officials who might so administer railways in Washington as to increase the cost of supplies to public institutions, diminish the profits of individual producers and retard the useful development of public lands. Here is an apprehension linked by anticipated steps to a conjectural conclusion of indefinite import. According to the rule which governs the suits of State and individual alike, the grievance is at most a damage without injury.

52. When we have found that neither the written law of Washington, nor any general principle of international law justifies this suit we perceive its real meaning. The Governor of the State, through his Attorney-General, requests the Supreme Court to restrain three foreign corporations (practically to dissolve one of them) because they disregard what is in his opinion a "policy" of Washington. This opinion, as we have seen, is not clearly supported by the legislature and the judiciary of the State, and, even if it were, the established "policy" of Washington does not measure the rights and rule the conduct of persons in other States.

If anything be needed to demonstrate the spectacular nature of this suit, it must be borne in mind that should the chief apprehension of Washington be realized in an unreasonable increase of railway rates, it is entitled to institute proceedings for their reduction.[2]

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[1] See Missouri *v.* Illinois (1901) 180 U. S. 208. [2] See S. 39.